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P-1431

CSA-02-14130-1

October 1, 2002



Associate Administrator for
Hazardous Materials Safety (DHM-1)
Research and Special Programs
Administration
Department of Transportation
Washington, D.C. 20590-0001

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U.S. DEPARTMENT OF
TRANSPORTATION

Re: Petition for rulemaking; permanent marking of plastic packagings containing poisons

Dear Sir:

This petition for rulemaking is filed by Arch Chemicals Inc., pursuant to the provisions of 49 CFR 106.31.

Petitioner. Arch Chemicals Inc. ("Arch"), 501 Merritt 7, Norwalk, Connecticut 06856; contact: Ms. Christine M. Zavada, telephone: (203) 229-3150.

Proposed action and purpose. Paragraph 172.313(b) requires that each non-bulk plastic outer packaging used as a single or composite packaging for materials meeting the definition of Division 6.1 be permanently marked, by embossment or other durable means, with the word "POISON" in letters at least 6.3 mm in height, with the marking placed within 150 mm of the closure of the packaging. This petition proposes that the Hazardous Materials Regulations ("HMR", 49 CFR Parts 171-180) be amended *either* to impose this marking requirement on non-bulk plastic outer single or composite packagings imported into the United States under the provisions of § 171.12(b) of the HMR, or to remove this requirement from the HMR. The purpose of the proposed action is to ensure that domestic producers of hazardous materials subject to the marking requirement in § 172.313(b) are not put at a competitive disadvantage to foreign producers importing similar materials into the United States, but who are not subject to that marking requirement when importing the material pursuant to the provisions of § 171.12(b) of the HMR.

Text of proposed amendment. The following amendment to the HMR is proposed:

1) In § 171.12(b), revise paragraph (b)(13), which is currently "Reserved", to read:

"(13) Single and composite plastic packagings containing hazardous materials meeting the criteria for Division 6.1 (in § 173.132 of this subchapter) must be marked in accordance with § 172.313(b) of this subchapter."

Or, alternatively:

- 2) Remove and reserve § 172.313(b).

Interest of petitioner. Arch is a manufacturer and distributor of a wide variety of hazardous materials used in both industrial and consumer applications. Certain of these materials meet the definition of Division 6.1, and, therefore, when transported for distribution to domestic customers in non-bulk single or composite packagings, the packagings containing these materials are subject to the marking requirement in § 172.313(b). One prominent example of an Arch product subject to this marking requirement is hydrazine, of which Arch is one of the few producers world-wide. Accordingly, Arch is directly affected by the marking requirement in § 172.313(b), and for reasons offered in this petition has a direct interest in the action proposed herein.

Arguments in support of the requested action. The petitioner believes that the current provisions of the HMR in relation to the permanent marking of certain plastic packagings containing materials meeting the definition of Division 6.1 places United States' producers of such materials at a competitive disadvantage to foreign producers who import the same materials in plastic packagings that are not required to bear such markings. Many end users of these products would prefer, if possible, *not* to have a *permanent* "POISON" marking on packagings for several reasons. One relates to the negative perception amongst members of the general public that such a marking evokes. Another, and of a more practical concern to end users, is that such a marking may make disposal or recycling of the plastic packaging much more difficult, and, therefore, more costly. Owing to these concerns, Arch has been requested by certain customers to remove these permanent markings from drums used to supply certain products - in particular, hydrazine. While Arch cannot agree to such requests in light of the requirements in § 172.313(b), these customers note that drums used by foreign suppliers to import the same product do not bear these markings. This difference is considered of sufficient importance to certain domestic customers to cause them to elect to be supplied by a foreign supplier in plastic drums not bearing (or required to bear) this marking.

Accordingly, the purpose of this petition for rulemaking is to ensure that both domestic and foreign chemical manufacturers and distributors are subject to the same marking requirements when supplying materials meeting the definition of Division 6.1 in plastic packagings to the United States market. That is, Arch in this petition is requesting that the HMR be amended in such a way as to ensure that domestic producers of hazardous materials subject to the marking requirement in § 172.313(b) are not put at a competitive disadvantage to foreign producers importing similar materials into the United States, but which are not subject to that marking requirement when importing the material pursuant to the provisions of § 171.12(b) of the HMR. To achieve this objective, the petitioner proposes that the HMR be amended *either* to impose this marking requirement on non-bulk plastic outer single or composite packagings imported into the United States under the provisions of § 171.12(b) of the HMR, *or* to remove this requirement from the HMR.

The first alternative - that of amending § 171.12(b) to require that packages otherwise transported in accordance with the provisions of the IMDG Code be made subject to the marking requirement in § 172.313(b) - requires little further discussion or explanation. Such action would be similar to that already reflected in § 171.12(b) in relation to, for example, packages containing PIH materials, and would have the effect of ensuring that the marking requirement in § 172.313(b) applies equally to all packages containing similar materials - whether imported or transported only domestically.

The second alternative - that of removing and reserving § 172.313(b) - would have the similar effect of ensuring equal treatment of plastic packagings containing Division 6.1 materials whether imported or transported only domestically. In this regard, the applicant recalls that the marking requirement in § 172.313(b) had its origins many years ago when plastic packaging technology was in its infancy and such packagings were only first being considered for wide use in the transport of hazardous materials. Thus, it may be appropriate to consider the relevance of this rather dated provision to modern plastic packagings, and in the context of the current provisions of the HMR. First, it is noted that no similar provision exists in any of the major international dangerous goods transport regulatory standards, and as far as the petitioner is aware no incidents have occurred owing to the lack of such a marking provision in those standards. Indeed, recognizing that the marking provision relates primarily to the possible subsequent use of packagings for purposes other than hazardous materials transport, it is questionable - notwithstanding the possible merits of the marking - whether it is appropriate that such a requirement be imposed under transport regulations as opposed to the regulations of other agencies (e.g., those responsible for consumer protection, workplace safety, etc.).

Moreover, the petitioner notes that the current provisions of the HMR limiting the permeability of packagings used for the transport of Division 6.1 materials may be sufficient to render the need for a permanent "POISON" marking unnecessary. In particular, the maximum permeability permitted by § 173.24(e)(3)(ii) for a plastic packaging used for any material meeting the definition for Division 6.1 is 0.5 percent - based on test methods which take account of the potential for extended periods of storage in the packaging. Perhaps more significantly, however, is that § 173.24(e)(3)(i) prohibits the use of any plastic packaging that is "permeable to such an extent that a hazardous condition is likely to occur during transportation, handling or refilling" (emphasis added). Thus, since no plastic packaging is authorized for domestic transportation under the HMR which is permeable to the extent that a hazardous condition may be created (including upon refilling with other materials), the need to permanently mark such packagings with the word "POISON" would not appear to be justified in the interests of safety. Finally, Arch notes that since this marking requirement was initially conceived and implemented, the defining criteria for "POISON" materials have been significantly expanded. This being the case, it can be questioned whether such marking is justified for safety reasons on packagings used for all such materials - in particular those in Packing Group III and many of the less toxic materials in Packing Group II - especially when taking into account the existing limitations imposed on permeability under the HMR (as previously outlined).

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In summary, for the foregoing reasons the petitioner requests that the HMR be amended to *either* impose the marking requirement prescribed in § 172.313(b) on non-bulk plastic outer single or composite packagings imported into the United States under the provisions of § 171.12(b) of the HMR, or to remove that requirement from the HMR. Arch believes that either of these actions will ensure that United States' manufacturers and distributors of products in packagings currently subject to that marking requirement will not be placed at a competitive disadvantage to foreign suppliers importing the same products in the same types of packagings.

Please do not hesitate to contact me if you have questions concerning this matter or if you require additional information.

Sincerely,

A handwritten signature in cursive script that reads "Chris Zavada".

Christine M. Zavada
Manager, Transportation Regulatory

Cc: R. Traggianese